

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN

---

ALVIN BALDUS, et al.,

Plaintiffs,

v.

Civil Action No. 11-CV-562

MEMBERS OF THE WISCONSIN  
GOVERNMENT ACCOUNTABILITY BOARD, et al.,

Defendants.

---

**CIVIL L.R. 7(h) EXPEDITED NON-DISPOSITIVE MOTION TO  
QUASH THE SUBPOENA ISSUED TO TAD OTTMAN**

---

Non-parties, the Wisconsin State Senate, by its Majority Leader Scott L. Fitzgerald; the Wisconsin State Assembly, by its Speaker Jeff Fitzgerald; and Tad Ottman submit this Civil L.R. 7(h) Non-Dispositive Motion to Quash the Subpoena issued to Tad Ottman (Ottman Dec., Ex. 1).

In the subpoena, Plaintiffs demand that Mr. Ottman, a Legislative Aide to Majority Leader Fitzgerald, “provide any and all documents, electronically stored information, and tangible things used by you or members of the Legislature to draw the 2011 redistricting maps enacted as Act 43 and Act 44,” as well as appear for a deposition three days after service. Fed. R. Civ. P. 45 requires a court to quash a subpoena that “fails to allow a reasonable time to comply,” “requires disclosure of privileged or other protected matter,” or “subjects a person to undue burden.” Fed. R. Civ. P. 45(c)(3)(A). Plaintiffs’ subpoena does all three and must be quashed.

**A. The Subpoena was Served Three Days Before the Date for Compliance.**

The subpoena violates **Rule 45(c)(3)(A)(i)** and must be quashed because it allows only three days to comply. The subpoena was served on Sunday evening, **December 4, 2011**, and

demands compliance and appearance at a deposition on **December 7, 2011**. (Ottman Dec. Ex.

1). Three days is not a reasonable time to collect documents and appear for a deposition. *See Mann v. Univ. of Cincinnati*, 824 F.Supp. 1190, 1202 (S.D. Ohio 1993) (stating that “issuance of the subpoena on one week’s notice was unreasonable and violated Rule 45(c)(2)(B)”).

**B. The Subpoena is Overbroad and Does not Specify the Documents Sought.**

The subpoena is vastly overbroad on its face in that it demands, without limitation, all documents “used by you or members of the Legislature to draw the 2011 redistricting maps enacted as Act 43 and Act 44.” The subpoena makes no attempt to specifically identify particular documents; it merely demands the entire files of every member of the Legislature. A blanket, all-encompassing subpoena such as this one is improper. *See Linder v. Calero-Portcarrero*, 180 F.R.D. 168, 174-75 (D.D.C. 1998). The subpoena also clearly seeks information that is outside of Mr. Ottman’s possession or control. As an unelected legislative aide, Mr. Ottman does not have control or custody over “documents used by . . . members of the Legislature.” *See Outside the Box Innovations, LLC v. Travel Caddy, Inc.*, 455 F. Supp. 2d 1374, 378 (N.D. Ga. 2006). As such, Mr. Ottman cannot be compelled to produce them. Even if the information were within Mr. Ottman’s control, the volume of information sought is unduly burdensome: Plaintiffs seek information from all 33 Senators and all 99 Assemblypersons. **Rule 45(c)(3)(A)(iv)** requires the Court to quash the subpoena on this ground.

**C. The Discovery Sought from Mr. Ottman is not Relevant to the Dispute.**

Additionally, the discovery sought from Mr. Ottman simply is not relevant to any of the claims or issues in this matter. At issue in the litigation is whether the resulting redistricting maps are constitutional. How the Legislature arrived at the final product is legally immaterial. The intent of any given participant in the process is immaterial. *See South Carolina Educ. Assn*

*v. Campbell*, 883 F.2d 1251, 1257-58 (4th Cir. 1989) (“The Supreme Court has long recognized that judicial inquiries into legislative motivation are to be avoided.”) Mr. Ottman is even one further step removed: Mr. Ottman is an aide who assisted the Senate leadership in connection with matters relating to the reapportionment of the Wisconsin Senate, Assembly, and Congressional districts arising out of the 2010 census. Since the actions or intent of individual legislators are irrelevant to the constitutional validity of Acts 43 and 44, those of a legislator’s aide are all the more immaterial to the dispute. To the extent the legislative process has any relevance, the legislative file and record, including committee testimony, are matters of public record and obtainable without a subpoena.

**D. The Subpoena Seeks Information that is Privileged.**

Mr. Ottman is a Legislative Aide to Senate Majority Leader Scott Fitzgerald. (Ottman Decl. ¶ 1). Mr. Ottman and the Assembly and Senate leadership consulted with legal counsel during the redistricting process. (*Id.* ¶ 4). Mr. Ottman’s actions related to redistricting took place in the context of assisting legal counsel in the provision of legal advice to Assembly and Senate leadership. (*Id.*). Accordingly, any information Mr. Ottman may have concerning the redistricting process is privileged and not subject to production. Not only is the information shielded by the attorney-client privilege, but documents created in this context are also shielded by the work-product privilege. *See In re Special September 1978 Grand Jury*, 640 F.2d 49, 61-62 (7th Cir. 1980) (documents can be created “in anticipation of litigation” and subject to work-product protection even if they are also prepared in connection with the filing of reports with a state board). **Rule 45(c)(3)(A)(iii)** requires this Court to quash the subpoena on this ground.

Plaintiffs have violated their duty to “take reasonable steps to avoid imposing undue burden or expense” on a responding party. Consequently, the Court “must ... impose an

appropriate sanction” on Plaintiffs or their counsel. Fed. R. Civ. P. 45(c)(1). Non-party respondents respectfully request an award of attorneys’ fees incurred in preparing this motion.

Dated this 6th day of December, 2011.

**MICHAEL BEST & FRIEDRICH LLP**

By: s/ Aaron H. Kastens  
Eric M. McLeod, SBN 1021730  
*emmcleod@michaelbest.com*  
Aaron H. Kastens, SBN 1045209  
*ahkastens@michaelbest.com*  
100 East Wisconsin Avenue, Suite 3300  
Milwaukee, Wisconsin 53202-4108  
Telephone: (414) 271-6560  
Facsimile: (414) 277-0656